

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KERRY LYNN CARROLL,

Defendant-Appellant.

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UNPUBLISHED

July 24, 2003

No. 238748

Oakland Circuit Court

LC No. 2001-177985-FH

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and assault with intent to commit great bodily harm less than murder, MCL 750.84. He was sentenced to prison terms of five to twenty years for the home invasion conviction and one to ten years for the assault conviction. He appeals as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the evidence was insufficient to sustain the assault conviction. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to commit great bodily harm are: “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). “Great bodily harm means a physical injury that could seriously and permanently harm the health or function of the body.” CJI2d 17.7(4). The defendant’s intent can be inferred from his acts, the means employed to commit the assault itself, and the extent of the victim’s injuries, although actual physical injury is not a necessary element of the crime. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992).

The evidence showed that defendant was hollering and making noise outside Alfred Patrick's home, demanding that Debra Myers, his former girlfriend, come out to see him. She refused to come out and he broke in through a wall of decorative glass blocks. Defendant pointed at Myers, said, "I'm gonna get you," and chased her up the stairs. He caught up to her in the hallway and karate-kicked her in the chest. When Myers tried to get away, defendant chased after her, fell on top of her on a bed, punched her repeatedly and bit her. The attack was so frenzied that being shot did not deter defendant and Patrick had to physically pull him off Myers. Such evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant acted with the intent to cause great bodily harm. The fact that he did not severely injure Myers does not preclude such a finding because the victim need not actually be injured. *Harrington, supra*.

Defendant next contends that he was denied a fair trial due to prosecutorial misconduct. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant takes exception to the fact that the prosecutor elicited testimony from Myers that she broke up with defendant because of his drug abuse and violent temper. Defendant objected to the testimony below on relevance grounds. On appeal, he contends that the testimony constituted impermissible character evidence under MRE 404(a). Defendant failed to preserve this issue because he did not specify the same ground for the objection as raised on appeal. *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). Therefore, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

The evidence at issue was offered only after defense counsel asserted in his opening statement that during the last few months of defendant's relationship with Myers, the two were cordial and got along well. Defendant thus opened the door to the issue of the nature of the relationship and reversal is not required. *People v Marrow*, 210 Mich App 455, 465-466; 534 NW2d 153 (1995), *aff'd* 453 Mich 903 (1996), overruled in part on other grounds by *People v Pasha*, 466 Mich 378 (2002). The prosecutor did not engage in misconduct by introducing evidence the trial court had properly ruled admissible. *People v Curry*, 175 Mich App 33, 43-44; 437 NW2d 310 (1989).

Lastly, defendant contends that the trial court incorrectly scored two of the offense variables at sentencing. A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any evidence in support will be upheld. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant first argues that he was improperly assessed points for OV 7. At the time defendant was sentenced fifty points were to be assessed if the "victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1)(a). The statute defined "terrorism" as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." Given that defendant crashed through a glass wall to get at Myers, who said

she was terrified by the act, then chased her through the house and subjected her to a frenzied attack, the scoring of OV 7 was supported by the evidence.

Defendant also claims that he was improperly assessed points for OV 10. Five points are to be assessed if the defendant exploited the victim by his difference in size or strength or both. MCL 777.40(1)(c). If this variable was improperly scored, it did not change defendant's classification in the sentencing grid. MCL 777.63. Because defendant's minimum sentence was within the appropriate minimum range, any error was harmless, *People v Ratkov (After Remand)*, 201 Mich App 123, 127; 505 NW2d 886 (1993), and his sentence must be affirmed. MCL 769.34(10).

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot  
/s/ Donald S. Owens